

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2065

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2065

NAPIER TALTON,

PETITIONER-APPELLANT,

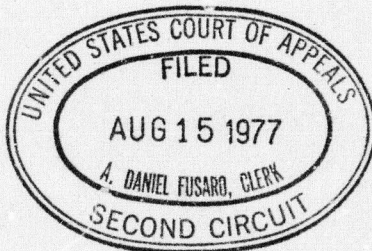
- VS -

CARL ROBINSON, WARDEN,
CONNECTICUT CORRECTIONAL INSTITUTION, SOMERS,

RESPONDENT-APPELLEE.

On Appeal From The United States District Court
For The District of Connecticut
Hon. M. Joseph Blumenfeld, District Judge

APPELLANT'S BRIEF



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APPELLEE.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Napier Talton was convicted in the Connecticut Superior Court of manslaughter in the death of Marsha Layne. His conviction followed a bench trial at which his written confession was received in evidence. [App. p. 54] After the confession was admitted, the court recessed and immediately reconvened in chambers to determine whether, or to what extent, the document in evidence accurately represented what Mr. Talton had told the police. [App. p. 70] This proceeding was conducted on the record, in the presence of

the Court Clerk, counsel for both sides, witnesses and a court reporter. Mr. Talton was not present. He was incarcerated because of his inability to post bond [App. p. 56] and during the chambers hearing was held in a cell in the basement of the courthouse. [App. pp. 14, 32] At the chambers hearing, the court listened to a tape recording of Mr. Talton's interrogation. [App. pp. 69-71]

The trial then returned to the courtroom. Mr. Talton was brought up from his cell and the tape recording was offered as a prosecution exhibit. At that point, Mr. Talton's attorney said: "When we recessed to hear these tapes in chambers, I asked the defendant if he wanted to be present for that session and he indicated to me no, he was upset, tired, and he would rather not." [App. p. 72] As the Connecticut Supreme Court subsequently found:

The trial court did not, at any time, ask the plaintiff about his absence from chambers or ask the plaintiff whether he wished to be present at the proceedings conducted there. The plaintiff did not personally make any statement on the record regarding his absence from chambers while the tapes were being played.

Talton v. Warden, 171 Conn. 378, 370 A.2d 965, 967 (1976).
[App. p. 55]

Following his conviction, Mr. Talton instituted a habeas corpus action in state court. On the appeal of that

action, the Connecticut Supreme Court held that Mr. Talton had a Sixth and Fourteenth Amendment right to be present at the chambers hearing at his trial, but that he had waived that right. Talton v. Warden, supra. [App. p. 53]

Mr. Talton thereupon instituted the present action. [App. p. 3] At the trial in the District Court, he testified that he had been unfamiliar with court procedures at the time of his state trial. [App. p. 14] He testified that when the recess was called during his trial he was not informed that its purpose was to play the tapes in chambers and that he had no such knowledge. [App. pp. 14, 32] He testified that he was not at any time offered an opportunity to be present in chambers while the tapes were played [App. p. 25] and specifically testified that his attorney in the state trial had not asked him whether he wished to be present. [App. p. 33] He further testified that the proceedings in his state trial were often conducted at or near the bench so that he was unable to hear them. He testified he did not hear his attorney make the representations quoted above. [App. pp. 35-36] No contradictory evidence was presented.

The District Court denied the petition on the grounds that (1) Mr. Talton had no constitutional right to be present at the chambers hearing [App. pp. 46-48], (2) if Mr. Talton

had such a right, he waived it [App. pp. 48-49], and (3) if he had such a right and did not waive it, any error was harmless beyond a reasonable doubt [App. pp. 49-50]. This appeal followed.

QUESTIONS PRESENTED

1. Did Petitioner Have A Sixth And Fourteenth Amendment Right To Be Present At The Playing Of His Recorded Interrogation In Chambers During His Bench Trial?
2. Did Petitioner Not Make a Knowing, Intelligent And Voluntary Waiver Of His Sixth And Fourteenth Amendment Right To Be Present At His Entire Trial?
3. Did Respondent Fail To Prove Beyond A Reasonable Doubt That The Constitutional Violation In This Case Was Harmless?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A R G U M E N T

I

PETITIONER HAD A SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE PRESENT AT THE PLAYING OF HIS RECORDED INTERROGATION IN CHAMBERS DURING HIS BENCH TRIAL.

As the District Court noted in its ruling below, the defendant in a criminal trial has a "well-established" right under the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment to be present at all stages of his trial, "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Citing Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934); Illinois v. Allen, 397 U.S. 337, 338 (1970). [App. pp. 45-46] Talton v. Warden, supra, 370 A.2d at 967. [App. p. 55]

The initial question in the present case, as both the District Court and the Connecticut Supreme Court noted, is whether that portion of Mr. Talton's bench trial conducted in chambers was one of the stages of trial at which he had a right to be present. The Connecticut Supreme Court held that it was; the District Court held it was not.

It would appear that when a defendant is absent from any portion of his criminal trial, at least once evidence has begun, there exists a rebuttable presumption that his constitutional right to be present has been denied. In Jones v. United States, 299 F.2d 661, 662 (10th Cir. 1962), the court said: "We can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error." Thus, the prosecution has the burden of establishing that the defendant's presence had no reasonably substantial relationship to his opportunity to defend, or that he waived his right of presence, or that the error in proceeding without him was harmless beyond a reasonable doubt.

The Connecticut Supreme Court found as a fact that "[t]he court's taking of evidence in chambers was a part of the trial, and the plaintiff's presence in chambers would have had a reasonably substantial relation to his opportunity to defend." 370 A.2d at 968. [App. p. 56] The court continued:

The proceedings in chambers were convened to verify the accuracy of a written statement, and the trial judge heard the tape recording for the first time. The purpose of the proceeding was to test the admissibility of one piece of evidence by the introduction of another piece of evidence. At the introduction

of the tapes, the plaintiff would have had the opportunity to advise his counsel on the accuracy of the tapes and on any defects in the reproduction on the tapes. In the present case, the plaintiff had a right to be present at the evidentiary hearing in chambers.

Ibid.

The state court based this determination on the transcript of Mr. Talton's trial. The District Court had before it no evidence on this issue other than the same trial transcript. It is respectfully submitted that the District Court erred in setting aside this factual determination by the state court without any additional facts on which to base its ruling. See generally, e.g., Iverson v. North Dakota, 480 F.2d 414, 426 (8th Cir.), cert. denied, 414 U.S. 1044 (1973).

Although the precise issue presented by the facts of this case appears not to have been litigated previously, courts have held the defendant's presence to be constitutionally required in many comparable situations. Thus, in Lowery v. Cardwell, 535 F.2d 546 (9th Cir. 1976), it was held that the defendant's presence might be required at an "off-the-record" chambers conference with the defendant's attorney, when the attorney attempted to withdraw because of the nature of the defendant's testimony. In People v. Nelson, 45 Ill.2d 1, 257 N.E.2d 104 (1970), it was held that an off-the-record chambers conference during a jury trial, involving the judge, prosecutor, and a prosecution witness could not constitutionally

be conducted in the defendant's absence. Grob v. Blair, 214 S.E.2d 330 (Va. 1975), held that the defendant in a criminal trial had a Sixth and Fourteenth Amendment right to be present at an in camera hearing on the issue of whether a prosecution witness would recant her identification testimony.

Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937), held the defendant had a right to be present in the Judge's chambers when he reiterated to the jury foreman, in the presence of all counsel, his earlier jury charge. The right of a defendant in a criminal case to be present when the jury is instructed has often been stated. E.g., Evans v. United States, 284 F.2d 393 (6th Cir. 1960); United States v. Treatman, 524 F.2d 320 (8th Cir. 1975); Rice v. United States, 356 F.2d 709 (8th Cir. 1966); Akins v. Cardwell, 500 F.2d 47 (10th Cir. 1974); Bustamante v. Eyman, 456 F.2d 269, 497 F.2d 556 (10th Cir. 1972). See also United States v. Glick, 463 F.2d 491 (2d Cir. 1972); State v. Hannagan, 559 P.2d 1059 (Alaska 1977). A defendant has a right to be present during the noting of objections to a proposed jury charge, Root v. Cunningham, 344 F.2d 1 (4th Cir.), cert. denied, 382 U.S. 866 (1965); and during counsel's closing arguments, Hazel v. United States, 353 A.2d 280 (D.C. App. 1976).

The defendant has a right to be present at a closed hearing on juror misconduct or bias, Commonwealth v. Robichaud, 264 N.E.2d 374 (Mass. 1970); People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955); at a hearing on the competency of a witness, United States v. Ashe, 155 U.S. App. D.C. 457, 478 F.2d 661 (1973); and at a suppression hearing, United States v. Dalli, 424 F.2d 45 (2d Cir.), cert. denied, 400 U.S. 821 (1970); United States v. Hurse, 477 F.2d 31 (8th Cir.), cert. denied, 414 U.S. 908 (1973); Redman v. State, 337 A.2d 441 (Md. Spec. App. 1975). But cf. United States v. Bell, 464 F.2d 667 (2d Cir. 1972). And a defendant has a right to be present at jury selection. United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969).

The reasoning of the Connecticut Supreme Court in its opinion in this case amply supports the conclusion that Mr. Talton had a Sixth and Fourteenth Amendment right to be present at the taking of evidence -- whatever the purpose -- in the judge's chambers during this bench trial.

II

PETITIONER DID NOT MAKE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE PRESENT AT HIS ENTIRE TRIAL.

The Connecticut Supreme Court and the District Court in this proceeding both found that Mr. Talton had waived his right to be present in the judge's chambers when his taped interrogation was played. This determination was based entirely on the trial transcript, which showed that Mr. Talton in fact was not present at the chambers session and that subsequently his attorney told the trial judge that Mr. Talton had advised him privately that he did not wish to attend that session. The District Court's finding is especially puzzling because it makes no mention of Mr. Talton's uncontroverted testimony at the hearing on his petition that (a) he was never advised that that the chambers session was planned, (b) he was never advised that he had a right to attend, (c) he was never asked if he wished to attend, (d) he never declined to attend, and (e) his attorney's subsequent statement to the trial judge was not heard by Mr. Talton because it was among many made near the bench and out of his range of hearing.

In the constitutional sense, waiver is the "intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis supplied). It

cannot be presumed or inferred from a silent record. Carnley v. Cochran, 369 U.S. 506, 516 (1962). See Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960). The fact that a defendant is incarcerated during his trial ordinarily makes it most unlikely that he has waived his right to be present at his trial, since his presence or absence from the trial is hardly within his own control, and thus substantially increases the burden on the government to prove a waiver. See, e.g., Evans v. United States, 284 F.2d 393 (6th Cir. 1960).

In Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963), the defendant was incarcerated at the time of his trial. During trial, his attorney advised the court that the defendant had refused to return to the courtroom from his holding cell. The trial court made no inquiry of the defendant, but accepted his counsel's representation as a waiver of the right to be present at trial. The Court of Appeals reversed, holding that in the case of an incarcerated defendant a finding of waiver could not be based merely upon the representations of counsel.

The trial court cannot passively assume the existence of a waiver of the right to be present at trial. It must itself conduct some sort of inquiry on the matter. Drope v. Missouri, 420 U.S. 162, 182 (1975). No such inquiry was conducted in this case. Moreover, defense counsel cannot

waive the defendant's right to be present unilaterally.

United States v. Crutcher, supra, 405 F.2d at 243; Hensley v. Municipal Court, 365 F. Supp. 373, 376 (N.D. Cal. 1973); People v. Smith, 6 Ill.2d 414, 129 N.E.2d 164, 165 (1955); People v. Ewing, 48 Mich. App. 657, 211 N.W.2d 56 (1973). See also Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968).

In United States v. Tortora, 464 F.2d 1202, 1209 (2d Cir. 1972), this court held: "Before a trial may proceed in the defendant's absence, ... [i]t must clearly appear in the record ... that the defendant was advised when proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present at the designated time and place...." (Emphasis supplied.) See Koehler v. State, 519 P.2d 442 (Alaska 1974) (knowledge of the court proceeding is a prerequisite to waiver of presence). In the present case, it is not even claimed by the Respondent that anything in the record before the chambers hearing suggested that Mr. Talton had waived his right to be present.

In addition to all the above considerations, it has been held that even if a defendant in a criminal case knowingly waives his right to be present at a proceeding conducted in chambers, the effect is not to permit such proceeding to be conducted there in his absence, but to require

that it take place in open court. In Ah Fook Chang v. United States, supra, at 809-10, the Ninth Circuit said: "[A]ppellants were entitled to be personally present at every stage of the trial. ... They could have waived that right by voluntarily absenting themselves from the trial, since they were not in custody. ... But a trial is supposed to take place in a courtroom, and here even if appellants had been in the courtroom, this proceeding would not have taken place in their presence, for it took place in the judge's chambers. If appellants had absented themselves from the courtroom voluntarily, they would have thus consented to the proceeding in the courtroom, but not at some other place." (Citations omitted.) No reason has ever been stated for playing the tape recorded interrogation in chambers rather than in open court.

Related to this is the final point that, even if a defendant waives his right of presence, it is ordinarily improper to conduct the trial in his absence and in most cases it would be an abuse of discretion to do so. United States v. Tortora, supra, 464 F.2d at 1210; United States v. Toliver, 541 F.2d 958, 964 (2d Cir. 1976). This rule obviously is not a constitutional command, but it suggests the great force of the constitutional command that defendants be personally present throughout their criminal trials and that courts commit constitutional error when they set aside this command

with the ease demonstrated by the lower courts in the present case.

III

RESPONDENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONSTITUTIONAL VIOLATION IN THIS CASE WAS HARMLESS.

The District Court held in this case that, if constitutional error was committed at trial, that error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). The court failed, however, to articulate any reasons for reaching that conclusion. Its basis is not at all apparent from the evidence before the trial court, which consisted chiefly of Mr. Talton's confession. Since the primary point of his presence at the chambers hearing would have been to assist his counsel in noting gaps, pauses, etc., on the taped interrogation or ways in which the taped version differed from his recollection, and since the confession was the major evidence against him, it is difficult to imagine how this particular error could have been harmless beyond a reasonable doubt. In any event, the District Court should be directed to articulate its reasoning on this issue.

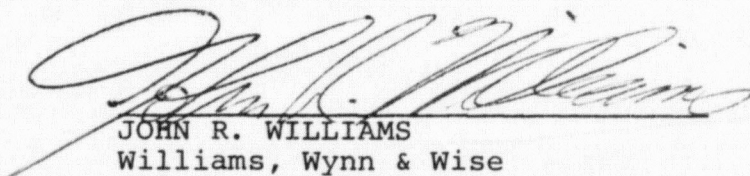
It is far from clear, however, whether the sort of error committed in this case could ever have been harmless. In United States v. Crutcher, supra, 405 F.2d at 244, this court held that a defendant's right to be present at jury selection was one of those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Quoting Chapman, supra, at 23. It based that conclusion on the fact that in the instance of jury selection it is impossible to know what subtle distinctions among veniremen might have been observed by the defendant. Similarly, in the present case, as the Connecticut Supreme Court noted, it is impossible to know the significance which subtle details of the tape recording would have had for the only one on the defense team who had been present at the time the recording was made.

Accordingly, in the present case, the error committed by the state court when it denied Mr. Talton the right to be present at the chambers hearing cannot be found harmless beyond a reasonable doubt.

C O N C L U S I O N

For the reasons recited above, this case should be remanded to the District Court with directions to enter judgment for the Petitioner or, alternatively, to take further evidence.

Respectfully submitted:

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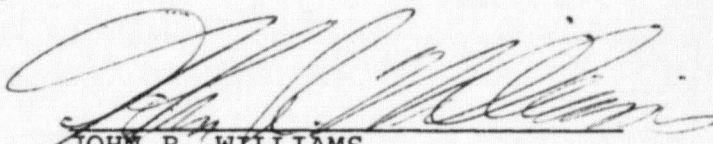
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CERTIFICATION OF SERVICE

This is to certify that on August 15, 1977, I personally delivered a copy of this brief, together with a copy of the Joint Appendix, to counsel for the Respondent at his office at 235 Church Street, New Haven, Connecticut 06510.



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